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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 134.

DAVID NAMET,
Petitioner,
v.
UNITED STATES.

PETITIONER'S BRIEF.

Opinion Below.

The per curiam opinion of the United States Court of Appeals for the First Circuit (Tr. 41) is reported at 301 F. 2d 314.

Jurisdiction.

The petitioner was convicted after a jury trial in the United States District Court for the District of Massachusetts (Tr. 1, 38) upon a two-count information charging him with wilful failure to pay the special wagering occupational tax and wilful failure to register prior to engaging in the wagering business (Tr. 4). He was sentenced to imprisonment for a period of four months and fined the sum of $1,000 (Tr. 38, 39). The judgment of the Court of Appeals was entered on April 23, 1962. The petition for a writ of certiorari was filed on May 21, 1962, invoking the juris-

diction of this Court under 28 U.S.C. 1254(1), and certiorari was granted by this Court on October 15, 1962, with the case being transferred to the summary calendar.

Question Presented.

The specific question presented is whether the United States District Court for the District of Massachusetts erred in permitting, over petitioner's repeated objections *ab initio*, Irving Kahn and Annette Kahn, a husband and wife—who had pleaded guilty in a similar but separate case involving a similar information—to testify before the jury, when the District Court and the prosecution were informed by defense counsel *ab initio* and in advance that each such witness would invoke his or her respective privilege against self-incrimination.

Underlying this question and encompassed therein is the further question whether the District Court's instruction with respect to the inferences which the jury might draw from the Kahns' refusal to testify was not only erroneous but also so prejudicial to the substantial rights of the petitioner that the judgment should have been reversed by the United States Court of Appeals for the First Circuit.

Further embraced within the specific question presented is the general conduct of the trial and the manner of questioning the Kahns on direct examination by the Government over the general objection to their testifying *ab initio*, in addition to many specific objections, which were sustained.

Statement of the Facts.

On March 19, 1960, the petitioner was arrested under a warrant in his home at 110 Bloomingdale Street, Chelsea,

Massachusetts, by a United States Marshal accompanied by several Special Agents of the Internal Revenue Service. Seized under a warrant of search was currency totaling $1,011.34, three *undated* number-pool slips from the petitioner's wallet, a quantity of pencils, ballpoint pens, unused pads of paper, telephone listing desk indices, miscellaneous political hand-out cards, and miscellaneous papers containing some numbers—*all undated*, except for two "half-number" give-away cards dated 1957 and 1958, respectively, and an envelope bearing a date of February (?) 1949—none of which dates were within the scope of the information.

Prior to his arrest a couple of Special Agents followed the petitioner on several occasions over a period of about a month, observing that the sixty-six-year-old petitioner was at his house, a variety or a cigar store at approximately the same time on those occasions, remaining in each for intervals varying from fifteen to forty-five seconds in the afternoon and from three to five minutes in the morning (Tr. 18). The petitioner travelled, weather permitting, in a bright red 1958 Ford, or on foot otherwise, all the time attired in a gray over-jacket, almost knee length, with patch pockets on either side of the over-jacket (Tr. 16). Sometimes he was observed visiting a variety store operated by the Kahns.

No agent could testify that he had ever seen the petitioner place a wager or accept a wager during this surveillance, even though some of the places the petitioner visited had a reputation for accepting wagers. The only observation made was that, when the petitioner visited these variety stores or cigar stores, his patch pockets had something in them (Tr. 16), but no witness could specify precisely what was in the patch pockets. The petitioner's son—a practising Massachusetts attorney who resided with the petitioner—testified that his father was not a "bookie" (Tr. 28); that

his father was pensioned from the Massachusetts Department of Public Works and also received a pension from the United States Government (Tr. 26); that his father, the petitioner, also ran errands around town and worked on a commission basis for the Quality Printing Press of Revere, Massachusetts (Tr. 27); that all of the physical exhibits taken from the petitioner's house had been around the house "for years" (Tr. 27); and, that the currency found in the house was the proceeds from his late mother's life insurance policy (Tr. 28). In all, nothing in the physical exhibits bore any date within the period encompassed by the Government's information.

Argument.

I. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS ERRED IN PERMITTING, OVER PETITIONER'S REPEATED OBJECTIONS AB INITIO, IRVING AND ANNETTE KAHN, A HUSBAND AND WIFE,—WHO HAD PLEADED GUILTY IN A SIMILAR BUT SEPARATE CASE INVOLVING A SIMILAR INFORMATION—TO TESTIFY BEFORE THE JURY, WHEN THE UNITED STATES COURT AND THE PROSECUTION WERE INFORMED BY PETITIONER'S DEFENSE COUNSEL AB INITIO AND IN ADVANCE THAT EACH SUCH WITNESS WOULD INVOKE HIS OR HER RESPECTIVE PRIVILEGE AGAINST SELF-INCRIMINATION.

Prior to its opening and immediately at the conclusion of the Government's opening, petitioner's counsel conferred at the bench with the Court and the prosecution, to the effect that the Kahns would avail themselves of their constitutional privilege under the Fifth Amendment (R. 6). Despite this the Court allowed the prosecution to call first as its witness Annette Kahn, who was also represented

previously (Tr. 2) by petitioner's counsel. Upon petitioner's first specific objection, in addition to his general objection *ab initio* (R. 7), the Court again conferred with counsel at the bench, and throughout the trial continued to confer with both attorneys—both in the Court's lobby and at the bench—on numerous occasions with which the transcript is replete concerning the contention of defense counsel that the Court should not force the Kahns to testify at the Government's behest as the Government's witnesses.

The transcript reflects manifestly the District Court's pervading awareness of the perils involved, viz.:

> (1) "As to the commission of any other crimes no, she cannot be [compelled to testify]; she has a right to claim the Fifth. But you have got to proceed on it slowly because— . . .
>
> "Now, I want you to be very careful not to bring in the commission of any other crimes, or ask her any questions which would relate other than to . . ." (Tr. 7, 8.)
>
> (2) "The Court [to attorney Fitzgerald for the defense]: I want you to consider another practical aspect of this. I know you are in a spot with separate defendants, but if she is going to claim the Fifth Amendment and the Court sustains her, when it comes to the disposition of her case she can't claim that she cooperated with the Government." (Tr. 8.)
>
> (3) "The Court [to the prosecutor]: Well, you have got a question—I am going to be very careful that she doesn't lend herself to a charge of conspiracy.
>
> "Now, conspiracy is a separate crime. You haven't charged it against either one of them here, and I can't let her testify to anything that will convict her of conspira[illegible], or lay her open to it.

"She has a right to claim the Fifth Amendment on that." (Tr. 9.)

(4) "Mr. Redmond: These statements were made not in the presence of the defendant, so that I have to convict Namet out of the Kahns' mouth.

"Mr. Fitzgerald: But you can't make them say any statements against him [i.e., Namet] that were not said in his presence.

"Mr. Redmond: I am not going to go through the conversation.

"The Court: I don't see how you can bring that evidence in without laying her open to a charge of conspiracy. She has a right to claim the Fifth . . .

. . . . . .

". . . In other words, if they [i.e., Kahns] testified to these things, it would be perfectly easy for you to go to a grand jury and get an indictment on a charge of conspiracy and they would have no—have you talked this over with Mr. Garrity?" (Tr. 11.)

(5) "The Court [to the prosecution]: Why don't you take the Kahns off the stand and use your other testimony?" (Tr. 12.)

Then, despite the foregoing consuming colloquies and recesses for the benefit of the Government, the Court still allowed the Government to recall to the witness-stand and to resume questioning Mrs. Kahn. Further bench discussion followed upon defense counsel's objections, continuing to manifest the Court's understanding of the peril—all in front of the jury:

(6) "Mr. Fitzgerald: I shall object to any further questions along this line, Your Honor.

"She is not on trial here.

"The Court: That is right. I will sustain the objection to that. You [i.e., the prosecution] had better proceed with your other witnesses.

. . . . . .

"Mr. Redmond: It is obvious I am not going to be able to proceed with these two witnesses [i.e., the Kahns].

"The Court: That is the way you [i.e., the Government] came in to court, until they decided to plead, so why don't you try the case that you had without them.

"Mr. Redmond: There is some question as to how strong our case is without them [i.e., the Kahns].

"The Court: Well, if you haven't got a case, drop it." (Tr. 13-14.)

After the immediately foregoing colloquy, wherein both the Court and the Government virtually conceded that the Kahns could not be used as Government witnesses, through their invocation of the Fifth Amendment, and when defense counsel asked that they be excused, the Court interceded as follows:

(7) "The Court [to the prosecutor]: . . . I think you may have made a mistake letting the Kahns go. I think you had better keep them until 2.00 o'clock. . . .

. . . . . .

"Or can you let one of them go home?

. . . . . .

". . . You may be criticized downstairs if you let them go." (Tr. 15.)

"Mr. Redmond: I don't like to be harsh. I would just as soon proceed with both of them [i.e., the Kahns], and see what I could do.

"Mr. Fitzgerald: Well, I would object.

. . . . . .

"The Court: Why don't you do this? Keep the Kahns here, but go right down and talk to him [i.e., U. S. Attorney Garrity] now, so you can tell Fitzgerald whether you want them or not. . . ." (Tr. 15.)

Thereafter the trial continued with Internal Revenue Special Agents as witnesses, until later at the bench there was more colloquy over the Government's use of the Kahns as witnesses:

(8) "The Court [to the prosecution]: I don't think you are going to be able to convince me about the Kahns, but I don't want to shut you off. . . ." (Tr. 22.)

(9) "The Court [to the prosecution regarding Annette Kahn's testimony]: No, I assume what she means to say is she doesn't want to testify because that may incriminate her.

"Mr. Redmond: All right, fine.

"The Court: She [i.e., Annette Kahn] doesn't have to specify why. All she has to say is that. At the moment I don't see how you can avoid a charge that anything she says might incriminate her if a charge of conspiracy was brought against her. Amongst other things; I just mentioned conspiracy.

"She may refuse to testify on the ground that it might show there was some bribery present, that she was operating a mission for some people. I don't know what the crime might be. If she says the evidence might incriminate her, I have to go along with her. . . ." (Tr. 22-23.)

Following another of many Government recesses, and, despite the general objection of defense counsel *ab initio* in addition to objections registered at the many bench and lobby conferences between the Government, defense counsel and the Court (as evidenced in part by 1 through 9, above), the Court permitted the Goverment to call Irving Kahn to the stand as its last witness (Tr. 23). On no less than eight occasions Irving Kahn invoked his privilege under the Fifth Amendment (Tr. 23, 24, 25) during his brief testimony to "testifying-type" questions directed by the Government in front of the jury, which almost led the witness into perjury (Tr. 23, 24) through his misinterpretation of his counsel's signal, which was prearranged with the Court.

Consequently, after leading off with Annette Kahn, the Government ended its direct evidence with Irving Kahn, leaving the jury to conjure what the answers to the Government's questions would have been had the Kahns' invocation of the Fifth Amendment privilege not been sustained for the most part by the Court, and raising the quaere as to what effect their mere presence on the witness-stand as forced Government witnesses had on the jury's minds, particularly when the Government pursued its conviction for bookmaking (Tr. 7, 23, 24, 25)—forced to be admitted by the Government's last witness, Irving Kahn—particularly in connection with whatever conjectural association they had with the defendant, David Namet, in the instant case. It is submitted that an undercurrent had to lurk in the jury's minds that they could infer that the petitioner was guilty through association with the Kahns.

Such extended examination of a witness who was a defendant in a similar trial, whose refusals to incriminate himself plant in the jury's mind the prosecution's theory of the crime not yet substantiated by evidence, causes reversible error, even though a cautionary admonition to disregard is given. See 45 West Virginia Law Review 596, 598 (May,

1959); also *Washburn* v. *State*, 164 Texas Criminal 448, 299 S.W. 2d 706 (1956).

The petitioner relies chiefly on the opinion of Mr. Justice Learned Hand in *United States* v. *Maloney*, 262 F. 2d 535, 537 (1959), wherein the Court stated:

> "When a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused. If the prosecution knows when it puts the question that he will claim the privilege, it is charged with notice of the probable effect of his refusal on the jury's mind. . . . Such refusals have been uniformly held not to be a permissible basis for inferring what would have been the answer, although logically they are very persuasive. . . . It is clear, not only that the presumed answer has not the sanction of an oath, but—what is even more important—that the accused cannot cross-examine. . . . If they once do get before the jury, there arises, as we have said, a strong probability that they will be taken as evidentiary . . . and it seems to us that the interest of the accused should prevail over that of the prosecution, and that the judgment should not stand, for the question touched vital elements of the charge. . . ."

In the instant case the petitioner contends that there is no question but that the Court and the prosecution, after advance advice that the Kahns would avail themselves of the Fifth Amendment, knew full well of the perilous and prejudicial course towards which the prosecution was navigating the evidence and the trial through the use of the Kahns as witnesses, so much so that no instruction by the Court, admonishing or otherwise, could cure such damaging inferences created for a lay jury. Once the Kahns

were forced to the stand, the irreparable damage was done, since the prosecution's theory of the crime was inferentially implanted in the layman jury's mind, even though the same was not substantiated by the evidence. See 45 Virginia Law Review 596 (May, 1959).

> ". . . [the] rule is compelled by the nature of the privilege. If a person is constitutionally protected from being forced to give testimony which may be used against him in a prosecution for a crime, such protection would be illusory if the very act of asserting the privilege constituted an admission of incriminating facts which could be used as evidence against him in a criminal case. . . ." Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 24 University of Chicago Law Review 472, 473 (1957).

Many authorities contend that an adverse inference is not only likely to arise, but is inherent in the fact that the privilege is claimed. Professor Wigmore states:

> "Logic is logic ever since the days of the One-Hoss Shay; and it is on that score impossible to deny that the claim of the privilege involves a confession of the fact. . . . An attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends towards confusion and a disrespect for the law's reasonableness." 8 Wigmore 2272 (3d Edition, 1940).

Again, in *Ullmann* v. *United States*, 350 U.S. 422, 428 (1956), the Court held:

> "No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It is aimed at a more far-reaching evil . . . Having had

> much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies."

The *Ullmann* case was quoted with approval by Chief Justice Magruder in *United States* v. *Maffie*, 209 F. 2d 225, 227:

> "Our Forefathers, when they wrote the provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has largely been forgotten today. . . . They made a judgment and expressed it in our funamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused . . ."

While it is submitted that, although the petitioner was not himself forced to testify, nor could he be, nevertheless the very fact that the Kahns, who through ingenious questioning were associated to him after their professed guilt and with the assistance of their claim of privilege under the Fifth Amendment, created an irreparably harmful illusion in the jury's minds in that the Kahns' very act of asserting the privilege constituted an admission of incriminating facts which could be used as damaging evidence against the petitioner although not subject to thorough cross-examination. The Kahns could have been indicted for conspiracy, conceivable bribery of a federal official, or in connection with several other federal crimes, had their claim of the privilege not been sustained. See *United States* v. *Chase*, 281 F. 2d 225, 229 (1960), where the Court stated:

> "Also a determined effort was made by the prosecuting attorneys to have the Defendants implicate others

> in the robberies. If the prosecution desired, there appears no reason why a 'conspiracy' could not have been brought . . ."

Throughout the trial of this matter the Court repeatedly expressed an understanding awareness of the perilous position into which it had placed the Kahns; yet the Court maintained an abiding refusal to exercise its judicial authority forthrightly in sustaining the petitioner's counsel (who was also the Kahns' counsel) in his contention under the *Maloney* rule that the Kahns ought not to be permitted to take the stand. Instead, the Court appeared to make large concessions to the Government in order to extricate some evidence out of the Kahns in an effort to build up, in whole or in part, with the assistance of enforced disclosures, a case which the Government readily admitted:

> "There is some question as to how strong our case is without them [i.e., the Kahns]" (Tr. 14)—

all of which made futile any objections by petitioner's counsel which were sustained.

II. The United States District Court for the District of Massachusetts was Not Only Erroneous in its Instruction with Respect to the Inferences the Jury might Draw from the Kahns' Refusal to Testify, but was Also Prejudicial to the Substantial Rights of the Petitioner so that the Judgment should have been Reversed by the United States Court of Appeals for the First Circuit.

In its charge to the jury at the conclusion of the testimony the Court admonished the jury as follows:

> "Nor should any inference be drawn against him [i.e., the petitioner] because the Kahns refused to

testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt." (Tr. 31.)

This is a plain error which the reviewing Court may notice under the provisions of the Federal Rules of Criminal Procedure, Rule 52(b).

Counsel further submits that, in view of his general objection *ab initio* to the Government's calling of the Kahns to the stand, which was overruled by the Court, and which it is contended should have been sustained, such an instruction or admonition to the jury would have been unnecessary in the first instance.

As in the *Maloney* case (*supra*), the analytical dilemma is that the acknowledgment that an unrequested admonition —which Justice Hand admits to be of questionable utility —will cure an error so gross that it affects the substantial rights of the defendant. As the concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949), so aptly states:

> ". . . The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ."

Nor is a witness's refusal to testify on grounds of self-incrimination a proper basis of evidence in a criminal trial, as the Court's instruction misled the jury to believe. *Billeci* v. *United States*, 184 F. 2d 394, 398. *Commonwealth* v. *Ries*, 337 Mass. 565, 150 N.E. 2d 527 (1958). See 8 Wigmore 2272 (*supra*).

Again, in the *Maloney* case, at page 358, Justice Learned Hand states:

> "As *res integra* it is doubtful whether such admonitions are not as likely to prejudice the interest of the

accused as to help them, imposing, as they do, upon the jury a task beyond their powers: i.e.—a bit of 'mental gymnastics', as Wigmore 2272 calls it, which it is for practical purposes absurd to expect of them."

It is tantamount to a judge telling a jury not to consider the confession or admission of defendant A in deciding the guilt of defendant B tried at the same time. *Delli Paoli* v. *United States*, 352 U.S. 232.

Consequently, with the Government opening its direct evidence with Annette Kahn and closing its direct evidence with Irving Kahn, both of whom availed themselves of their privilege against self-incrimination with the prior knowledge to that effect of the prosecution and the Court, and over the general objection of counsel *ab initio*, efforts of counsel through objections, production of the petitioner's son—a licensed practising attorney who lived with the petitioner—summation to the jury, or request for any sort of admonition, by way of instructions to the jury, were and would have been futile to overcome the irreparable damage to the petitioner's substantial rights, particularly to a fair trial, since the trial was tainted initially through the Court's permitting the Kahns to testify, or to take the stand and invoke their constitutional privilege under the Fifth Amendment.

The Court, in its unsolicited and incorrect admonishing instruction (Tr. 31, *supra*), added to the harm already initially done by reiterating and by refreshing the jury's recollection of the Kahns' invocation of the "Fifth" just moments before the jury retired for its short deliberation. Any further amplification of this dilemma and predicament by counsel would not have been curative but rather would have re-emphasized the role of the Kahns as Government-forced witnesses injuring the petitioner's position all the more.

III. The General Conduct of the Trial Relative to the Government's Interrogation of the Kahns on Direct Examination over the General Objection to their Testifying ab Initio in Addition to Many Specific Objections, which were Sustained, Irreparably Damaged the Petitioner.

After the general objection to the use of the Kahns as witnesses, the Court permitted the Government to call Annette Kahn to the stand and, after a few preliminary questions, the prosecution asked:

> "Q. During 1960, Mrs. Kahn, did you and your husband have some type of business relationship with the defendant David Namet?" (Tr. 7)—

to which the witness invoked the privilege, a bench conference ensued (Tr. 7, 8, 9, 10, 11, 12), and the objection was sustained.

Again later the prosecution persisted in pressing its theory, to wit:

> "Q. After March 19, 1960. You [i.e., Annette Kahn] didn't know prior to that what it was, and you didn't know that a person who was engaged in accepting wagers had to register, and you didn't know that a person—" (Tr. 13)—

to which objection was pressed, and another bench conference ensued (Tr. 13, 14, 15), the result of which appeared to be that the Government and the Court had finally agreed that the Kahns could not be forced to testify or be placed on the stand.

Finally, when the prosecution was permitted to call Irving Kahn to the stand as its last witness on direct examination—again over the general objection of the petitioner—the following series of questions were put to him:

"Q. Do you know the defendant David Namet?

"A. Yes, sir.

"Q. Did you have some dealings with the defendant David Namet in February and March of 1960?

"A. I refuse to answer by advice of counsel.

"The Court: All right, I will order you to answer that question. The question is yes or no, did you have some dealings with him?

"The Witness: Yes.

"Q. Can you tell what those dealings were?

"A. I refuse to answer on advice of counsel.

"The Court: Go ahead. Next question.

"Q. Did you accept wagers at your variety store in Chelsea in February and March of 1960?

"A. I refuse to answer on the advice of counsel.

"The Court: I will allow that question." (Tr. 23.)

"Q. And were you paid a commission on all bets you took in your variety store?

"A. I refuse to answer.

"The Court: I will sustain that objection. Next question.

"Q. How often did the defendant David Namet come to your store, Mr. Kahn?

"A. I refuse to answer.

"The Court: No, you may answer that.

. . . . . .

"Q. How often did he come to your store?

. . . . . .

"A. A couple of times a week.

"Q. Isn't it a fact that he came once in the morning and once in the afternoon?

"A. No, sir.

"Q. Every day of the week?

"A. No, sir.

"Q. Well, let's exclude Sundays. Monday through Saturday didn't he come to your store twice every day, once in the morning and once in the afternoon?

"A. No, sir.

"Q. Who did you accept the bets for that you took in your variety store?

"A. I refuse to answer.

"The Court: I will sustain that. Next question.

"Q. Did you ever take bets for the defendant David Namet?

"The Court: I will sustain an objection to that." (Tr. 25.)

The petitioner submits again that this questioning could have been avoided had the Court properly sustained petitioner's objection to the forcing of the Kahns to the stand initially. To repeat what was said before, reversible error is caused by an extended examination of a co-defendant whose refusals to incriminate himself plant in the jury's mind the prosecution's theory of the crime not yet substantiated by evidence, 45 West Virginia Law Review 596, *supra*. Calling and questioning, over defendant's objection, witnesses jointly indicted with the defendant, with knowledge of their forthcoming refusal, is reversible error. *Johnson* v. *State*, 158 Texas Criminal 6, 252 S.W. 2d 462 (1952).

Consequently, the petitioner contends that the prosecution, through the Court's error in allowing the Kahns to take the stand, inferentially elicited some evidence through the prosecutor's "testifying-type" of questions, objections to which were sustained upon the witnesses' invocation of the Fifth Amendment. Such inferences contaminated the conduct of the trial and poisoned the jury's mind beyond

any salvation through a Court's instruction or otherwise. Such deliberate damage, as evidenced by bench colloquies and the questions themselves, affected the substantial rights of the petitioner, who should not be penalized by over-zealous prosecution.

Conclusion.

Without indulging in repetition of the foregoing arguments, the petitioner contends that the trial was permeated with the spectre of evidentiary inferences permitted when the Court failed to heed the general objection of the petitioner in advance and *ab initio* to the use of the Kahns as witnesses for the Government because the Kahns intended to avail themselves of their privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States, so much so that real and substantial damage was done to the rights of the petitioner which no final instruction or admonition to the jury could cure.

Once the Kahns were forced to the stand, the damage was done. Anything thereafter in the trial prejudicial to the petitioner flowed as an unavoidable consequence of the initial error and compounded it. Once before the jury and invoking their privilege there arose a strong probability that the Kahns' refusal would be taken as evidentiary without the sanction of an oath or the benefit of cross-examination. Likewise, the professed guilt of the Kahns to a similar charge, which was virtually retried during their forced interrogation, and their sparse association with the petitioner, indelibly added to any fixation of the petitioner's guilt in the jury's mind, which was in turn compounded by the method of questioning. Nor could any instruction by the Court have erased such fixed inferences from the jury's mind.